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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71- 71 - 1189

MILDRED FRANCES ANDREW, ADMINISTRATRIX OF THE ESTATE OF EDWIN FRANKLIN JACKSON, CAPTAIN, DECEASED,
Petitioner,

VS.

THE BENDIX CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LYMAN BROWNFIELD
LAURENCE E. STURTZ
BROWNFIELD, KOSYDAR, BOWEN, BALLY & STURTZ
88 East Broad Street
Columbus, Ohio 43215
Counsel for Petitioner

March, 1972

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on December 20, 1971.

OPINIONS BELOW

The order and opinion of the United States District Court overruling Respondent's Motion to Dismiss for the reason that Petitioner's claim is barred by the statute of

limitations is unreported, but reproduced in the Appendix to the Petition as APPENDIX A. The decision of the United States Court of Appeals for the Sixth Circuit (Case Nos. 71-1289 and 71-1290) is reported at ..... F2d ....., and is reproduced in the Appendix to this Petition as APPENDIX B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the Ohio "saving statute" (Ohio Revised Code Section 2305.19) may constitutionally be restricted to actions which were originally prosecuted in Ohio, so as to deny benefits of the statute to transitory causes of action which were originally prosecuted in another jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution of the United States and the provisions of Ohio Revised Code Section 2305.19 are set forth in APPENDIX C annexed hereto.

STATEMENT OF THE CASE

On April 7, 1960, Petitioner's decedent, Captain Edwin Franklin Jackson, United States Marine Corps, died immediately as a direct result of injuries sustained in the crash of a Navy A4D-2 aircraft which he was piloting. Captain Jackson was flying an assigned mission from the Marine Corps Air Station in Cherry Point, North Carolina.

On June 14, 1961, Petitioner filed an action for wrongful death in the United States District Court for the Dis-

trict of Columbia. Respondent entered its general appearance in that cause. Because Petitioner's original Complaint was filed on a theory of negligence only, in December, 1963, Petitioner requested permission to file an Amended Complaint to add a theory of warranty on the same facts. On February 18, 1964, the United States District Court for the District of Columbia entered an Order overruling Respondent's objection to the recommendation of the Court's pre-trial Examiner that Petitioner be permitted to file the Amended Complaint. Pursuant to this Order, the Amended Complaint was filed on March 27, 1964.

On June 23, 1964, another branch of the District Court of the District of Columbia, apparently without knowledge of the prior acts of the Court and the litigants, dismissed the action, without prejudice, for want of prosecution. Petitioner could easily have had the dismissal vacated and proceeded in the District of Columbia's District Court. However, Petitioner chose to refile her action in Ohio. The Complaint filed in the District Court in Ohio was identical to the Amended Complaint which had been filed in the District of Columbia in March of 1964. Petitioner decided to file the action in Ohio to facilitate discovery of her action. The unit which Petitioner claims was improperly produced was made in Cincinnati, Ohio, and as a consequence, most of the discovery work took place in the Cincinnati, Ohio area.

When Petitioner filed her action in Ohio, Respondent moved the Court for dismissal on the ground that the statute of limitations barred the claim. The United States District Court held that the Ohio "saving statute" was applicable and thus the statute of limitations did not bar Petitioner's action. A trial on the merits was held and a jury rendered a verdict for Respondent.

Petitioner appealed to the United States Court of Appeals, Sixth Circuit, alleging error in the trial court. Respondent perfected a cross appeal reasserting their contention that the action was barred in Ohio by the statute of limitations because the Ohio "saving statute" is not applicable. The Appellate Court agreed dismissing the appeal. A copy of the dismissal order of the Court of Appeals for the Sixth Circuit is annexed hereto as APPENDIX B.

REASONS FOR GRANTING THE WRIT

As nearly every State has done, Ohio has provided by statute for the bringing of a new action after a timely commenced action has failed other than upon the merits. The decision of the Sixth Circuit Court of Appeals unconstitutionally restricts the application of the Ohio "savings" statute to actions which were previously commenced and dismissed in Ohio.

There is no constitutional requirement that Ohio enact a savings statute. However, if such a statute is enacted, it cannot be so structured or so interpreted as to discriminate arbitrarily and unfairly in its application. If limited to actions originally instituted in Ohio, the statute arbitrarily and unfairly discriminates against plaintiffs who have filed previous actions in federal courts in sister jurisdictions rather than in the forum state's federal court. There is no valid reason for this classification. The discrimination violates the due process of laws requirement of the Fifth Amendment to the Constitution.

It is self-evident that our society is a changing and mobile society. The United States Supreme Court recognized this mobility in the case of *Shapiro v. Thompson*, 394 U. S. 618 (1969). *Shapiro* held unconstitutional a statutory provision which denied welfare assistance to

residents of a state or district who have not resided within their jurisdiction for at least one year immediately preceding their application for assistance.

Mr. Justice Brennen, delivering the opinion of the Court stated:

> "This Court long ago recognized that the nature of our Federal Union and constitutional concept of personal liberty unite to require that all citizens be free to travel through the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably restrict or burden this movement. That proposition was early stated by Chief Justice Taney in Passenger Cases, 7 How. 283, 492 (1849): 'For all the great purposes for which the Federal government was formed, we are one people with one common country. We are citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own state.'"

The Supreme Court held:

> "In terms of Federal power, discrimination created by the one year requirement violates the due process of laws of the Fifth Amendment. While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be in violation of due process."

The discrimination which Petitioner incurs from the restrictive application of Ohio's saving statute is similarly unjustifiable under Fifth Amendment due process standards. Such restrictive application must be struck down in favor of an application which recognizes the

right of persons to travel without unreasonable burdens and provides the benefits of the statute to transitory causes of action.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LYMAN BROWNFIELD
LAURENCE E. STURTZ
BROWNFIELD, KOSYDAR, BOWEN,
BALLY & STURTZ
88 East Broad Street
Columbus, Ohio 43215
(614) 221-5834
Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 7338

MILDRED FRANCES ANDREWS,
Administratrix of the Estate
of Edwin Franklin Jackson,
deceased,
Plaintiff

vs.

BENDIX CORPORATION,
Defendant

Order

(Filed May 28, 1969)

This matter is before the Court on defendant's motion to dismiss:

Branch A: For improper venue;

Branch B: For failure to state a claim upon which relief can be granted; and

Branch C: For the reason that plaintiff's claim is barred by the statute of limitations.

The motion has been well considered on the amended complaint and the supporting and contra memoranda filed by the parties herein.

Branch A: *Venue*

In support of this branch of the motion, defendant contends that the allegations of jurisdiction and venue

found in the amended complaint clearly show that this action has been commenced in the wrong judicial district. Since jurisdiction is alleged to be based on diversity of citizenship, the applicable venue requirements are those provided in 28 U.S.C.A. §1391. Insofar as applicable, that section provides:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside or in which the claim arose.
>
> . . .
>
> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

The Court tends to believe, without expressly deciding, that the allegations in the amended complaint fail to establish venue in this court. However, plaintiff has filed an affidavit stating that defendant Bendix Corporation is doing business in this district and that is sufficient for the purpose of Section 1391.

WHEREUPON, the Court determines that Branch A of the motion is without merit.

Branch B:—Failure to State a Claim

Defendant has failed to offer any factual allegations or legal arguments with respect to this branch of its motion.

WHEREUPON, the Court determines that Branch B of the motion is without merit.

Branch C: Statute of Limitations

The record discloses, (1) that the event which forms the basis of plaintiff's claim occurred on April 7, 1960, at the Marine Corps Air Station in Cherry Point, North Carolina, (2) that the plaintiff commenced a civil action for the recovery of damages against defendant in the United States District Court for the District of Columbia on June 14, 1961, (3) that on February 18, 1964, the United States District Court for the District of Columbia entered an order overruling defendant's objections to a recommendation of the Court's Pretrial Examiner that plaintiff be permitted to file an amended complaint, (4) that plaintiff did file her amended complaint on March 27, 1964, said amended complaint being identical to that filed in this action on January 5, 1965, (5) that on June 23, 1964, another branch of the United States District Court for the District of Columbia dismissed the action "without prejudice" for want of prosecution as of January 7, 1964, and, (6) this action was commenced January 5, 1965.

The law which controls on the question of whether, under the above facts, this action is barred by a statute of limitations is Ohio savings statute, Ohio Rev. Code §2305.19. *Kleve* v. *Negangard*, 330 F.2d 74 (6th Cir. 1964); 9 *O.Jur. 2d* 834, *Conflict of Laws* §17. Section 2305.19 provides that where an action is dismissed "otherwise than on the merits" it may be commenced within one year of the dismissal.

The dismissal by the United States District Court for the District of Columbia was not a decision on the merits, and plaintiff has not failed otherwise than on the merits within the meaning of Section 2305.19. *Sherman* v. *Air Reduction Sales Co.*, 251 F.2d 543 (6th Cir. 1958).

WHEREUPON, the Court determines that Branch C of the motion is without merit.

ACCORDINGLY, defendant's motion to dismiss is DENIED.

.....

United States District Judge

APPENDIX B

Nos. 71-1289 and 71-1290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MILDRED FRANCES ANDREW, Administratrix of the Estate of Edwin Franklin Jackson, Captain, Deceased,

Plaintiff-Appellant and Cross-Appellee,

v.

THE BENDIX CORPORATION,

Defendant-Appellee and Cross-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed December 20, 1971.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and PECK, Circuit Judges.

PECK, Circuit Judge. Trial of this wrongful death action in the District Court resulted in a verdict and judgment for the defendant, followed by this appeal alleging errors in evidentiary rulings during trial. The defendant perfected a cross-appeal alleging error by the District Court in holding that the action was not barred by the statute of limitations. The parties will hereby usually be referred to as they were in the trial court.

The incident which resulted in the death of plaintiff's decedent and which gave rise to this action occurred

April 7, 1960. On June 14, 1961, plaintiff filed a wrongful death action in the United States District Court for the District of Columbia, which court dismissed the action for want of prosecution as of January 7, 1964. That dismissal may or may not have resulted from some lack of communication within the District Court, but in any event without seeking to have the order of dismissal vacated, plaintiff for reasons which she here attributes to a greater comparative facility in discovery procedures filed the complaint in the present case in the District Court for the Southern District of Ohio on January 5, 1965. In this general regard, it is to be noted that the death of plaintiff's decedent occurred in North Carolina, that she is a resident of that state and that she was appointed administratrix of the decedent's estate by a probate court of a North Carolina county. The defendant is alleged in the complaint to be a Delaware corporation with its principal place of business in Michigan and with an office in the Northern District of Ohio.

That the action is to be governed by the law of Ohio is not in debate, and the parties agree that the applicable statute of limitations is Ohio Revised Code Section 2125.02 which provides that "every such action must be commenced within two years after the death of [the decedent]." What is at issue is whether or not the Ohio "savings statute" (ORC § 2305.19) has application. That section provides in pertinent part:

> "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff * * * may commence a new action within one year after such date. * * *"

Some comment to the contrary notwithstanding, we without hesitation conclude that for present purposes the entry of the District of Columbia District Court constituted a dismissal of that action "otherwise than upon the merits," and had that order been entered by an Ohio court plaintiff would clearly have been authorized by this statute to "commence a new action within one year." Thus the sole issue presented on the cross-appeal is whether the Ohio savings statute has application to a cause of action against which the statute of limitations has run, but where the cause has failed other than on its merits in another jurisdiction. Neither the Supreme Court of Ohio nor any Ohio court of appeals having passed on this issue, it is incumbent upon us to attempt to determine on the basis of logic and existing law which way Ohio's highest court would decide the question. *Davis* v. *Smith*, 253 F.2d 286, 289 (3rd Cir. 1958).

The district judge, citing *Kleve* v. *Negangard*, 330 F.2d 74 (6th Cir. 1964), and 9 O. Jur.2d 834, *Conflict of Laws*, Sec. 17, determined the issue to be the applicability of the Ohio savings statute. Concluding as we do that the failure of the District of Columbia action was "otherwise than on the merits within the meaning of Section 2305.19," and after citing *Sherman* v. *Aid Reduction Sales Co.*, 251 F.2d 543 (6th Cir. 1958), he in effect found the savings statute applicable and as hereinabove indicated permitted the cause to proceed through jury trial. In following this course, however, and specifically noting that the dismissal was "by the United States District Court for the District of Columbia", no recognition is taken of the fact that the issue might vary from that presented where the earlier dismissal was by an Ohio tribunal. As indicated, the District Court relied on *Sherman* for the conclusion reached, but therein the dismissal for want of prosecu-

tion was by the Common Pleas Court of Lucas County, Ohio, and the new action commenced within the savings statute period was in the District Court for the Northern District of Ohio. Thus that decision is of no assistance in considering the effect of a dismissal other than on the merits by a non-Ohio tribunal.

A case precisely in point is that of *Herron* v. *Miller*, 96 Okla. 59, 220 P. 36 (1923). While that is, of course, a state court opinion, it was adopted in its entirety by the Tenth Circuit Court of Appeals in *Estate of Tuckman* v. *Estate of Cottle*, 175 F.2d 775 (1949), and *Herron* was also cited with approval and followed in *Riley* v. *Union Pacific Railroad Company*, 182 F.2d 765 (1950). In all three of these cases the savings statute under consideration was for present purposes identical to ORC § 2305.19. Thus the law of the Tenth Circuit would clearly require a conclusion favorable to the present defendant on the statute of limitations question, since the syllabus by the court in *Herron* states:

> "Section 190 Comp. St. 1921, providing that where an action which has been commenced within due time fails otherwise than on its merits a new action may be commenced within one year after such failure, *refers to actions which have been commenced within this state within due time* and have failed otherwise than upon the merits, *but the statute has no application, to actions which have been commenced within other states* and have failed otherwise than upon the merits." (Emphasis supplied.)

See also, *Morris* v. *Wise*, 293 P.2d 547 (Okla. S. Ct. 1956); 55 A.L.R.2d 1033.

A more recent state court decision of identical import is *High Admr.* v. *Broadnax*, 271 N.C. 313, 156 S.E.2d

282 (1967). Therein the original wrongful death action was instituted in the United States District Court for the Western District of Virginia, and following its nonsuit a new action was filed in North Carolina after the statute of limitations had run but within the one-year period prescribed by the North Carolina savings statute. In holding the latter statute inapplicable, the court stated, "We adhere to the general rule that a statute of the forum which permits a suit to be reinstituted within a specified time after dismissal of the original action otherwise than upon its merits has no application *when the original suit was brought in another jurisdiction.*" 156 S.E.2d at 284. Thus while we attach no particular significance to this circumstance, it is interesting to note that in the present situation had the first action been instituted in a state or federal court in Ohio (or, indeed, in a state or federal court anywhere except in North Carolina), the plaintiff's action would be subject to dismissal in North Carolina under *Broadnax*. In an action first brought and dismissed within the period of the statute of limitations in North Carolina, a District Court in this Circuit held the savings statute inapplicable in *Sigler* v. *Youngblood Truck Lines*, 149 F. Supp. 61 (E.D. Tenn. 1957).

In the light of logic and the applicable decisions from other jurisdictions we conclude that the Supreme Court of Ohio would hold, as we therefore do, that Ohio Revised Code § 2305.19, which permits the commencement of a new action when a former timely filed suit on the same cause has been dismissed otherwise than on its merits within one year of such commencement, has application only where the first action had been filed within the State of Ohio, and specifically that it is without application where the first suit was filed in a federal or state court in another state. At all stages of the proceedings

in the above case the defendant-appellee-cross-appellant has carefully preserved its position with reference to the order of the District Court which denied its motion to dismiss for the reason that plaintiff's claim was barred by the statute of limitations, and it being here determined that such denial constituted error, relief on the cross-appeal is considered appropriate. It accordingly becomes unnecessary to consider the contentions raised on appeal by the plaintiff-appellant.

The appeal will be dismissed and final judgment entered for the defendant-appellee-cross-appellant.

APPENDIX C

Constitution of the United States
Amendment to the Constitution

(AMENDMENT V)

(Rights of Persons)

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Ohio Revised Code

§ 2305.19 Saving in case of reversal. (GC § 11233)

In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. If the defendant is a corporation, foreign or domestic, and whether its

charter prescribes the manner and place, or either, of service of process thereon, and it passes into the hands of a receiver before the expiration of such year, then service to be made within the year following such original service or attempt to begin the action may be made upon such receiver or his cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of such agents or officers of the receiver with the person having charge thereof. If such corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no such agent, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on such defendant.